85-557

No.

Supreme Court, U.S.
FILED
SEP 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MICHAEL SIERRA,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RAYMOND E. LaPORTE
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Attorney for Petitioner,
MICHAEL SIERRA

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QUESTIONS PRESENTED

1. Whether the Government's threatened use against Petitioner of uncharged similar act evidence, combined with the denial by the Court of Petitioner's requests of pre-trial and trial disclosure, prior to Petitioner testifying, of the basics of the evidence, denied Petitioner due process of law.

2. Whether the Court's rulings allowing into evidence a wholly separate and collateral cocaine transaction not involving Petitioner or his co-defendants, deprived Petitioner of due process of law.

3. Whether Petitioner was deprived of due process of law and a fair appeal when the prosecutor orally argued matters not in the record, or in the Government's brief, and the Court of Appeals denied Petitioner's subsequent motion to correct or modify the record and to permit further briefing.

PARTIES BELOW

United States of America

Michael Sierra

Fred Arthur Anderson

Joseph Henry Kotvas, Jr.

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OCTOBER TERM, 1985

No.

MICHAEL SIERRA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed Petitioner's conviction *per curiam,* without an opinion, pursuant to Rule 25 of the Rules of the Eleventh Circuit. The Court of Appeals entered its Order denying rehearing on August 1, 1985. Copies of the Orders of the Court of Appeals appear in the Appendix.

JURISDICTION

The original judgment of the Court of Appeals was entered on May 28, 1985. Rehearing was denied on August

1, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property without due process of law;"

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Middle District of Florida (Carr, J.) Petitioner was convicted of conspiracy to obstruct interstate commerce by extortion in violation of 18 U.S.C. Section 1951. Sierra was sentenced to a four year term of imprisonment, and has commenced serving his sentence following the issuance of the mandate by the Court of Appeals.

The Indictment contained two Counts. Count One charged the Petitioner, a practicing attorney, and Fred Arthur Anderson, Joseph Henry Kotvas, Jr., John DeCarlucci and Jerry Merle Bowmer with the conspiracy to obstruct interstate commerce by extortion.

On May 3, 1983, Bowmer entered into a plea agreement, withdrew his plea of not guilty, and entered a plea of guilty to both Counts. Bowmer testified for the Government at trial and has not as yet been sentenced.

During the course of the trial a mistrial was granted to DeCarlucci because his attorneys had an apparent conflict of interest.

The conspiracy charged in Count One concerned a pending application by brothers Peter and Nick Geraci to the

County Commissioners to rezone a large tract of land known as the Galleria project.

Practically all of the testimony reflecting Sierra's alleged participation to extort money from the Geraci brothers for the County Commissioners came from County Commissioner Jerry Bowmer.

The Geraci/Galleria Petition to rezone passed at the Commission meeting of January 27, 1983.

On January 31, 1983, Jerry Bowmer met Pickens Talley, who had been cooperating with the F.B.I., and Bowmer took an amount of money from Talley in part payment for the passage of the Geraci rezoning Petition. Immediately after the meeting Bowmer was arrested and Bowmer agreed to cooperate with the F.B.I.

The following morning, February 1, 1983, Bowmer, while acting on behalf of the F.B.I., went to the County Commission offices of Anderson and Kotvas while carrying $10,000.00 provided by the F.B.I. Bowmer delivered approximately $5,000.00 each to Anderson and Kotvas. Bowmer tape recorded his conversations of February 1, 1983, with Anderson and Kotvas.

Pickens Talley did not meet with or know Michael Sierra. The Government did not call either Peter or Nick Geraci as witnesses.

Michael Sierra did not testify because of the Government's threats to use undisclosed alleged similar act evidence against Sierra on rebuttal if Sierra testified.

Sierra did call both Geraci brothers as his witnesses during the presentation of Sierra's case. Both Peter and Nick Geraci gave testimony totally exculpatory to Sierra. Nick Geraci had never spoken to Sierra before the trial and did

not know Sierra. Peter Geraci did not know Sierra and had only talked with Sierra in a brief two minute telephone conversation which did not contain any attempt to extort money.

The prosecutor cross-examined both Geraci brothers extensively about a collateral cocaine transaction in Vero Beach, Florida in October, 1982. None of the defendants were investigated or even suspected of any participation in this collateral cocaine deal. The only purported relevance advanced by the prosecutor was the Government's belief that it would go toward proving that the Geraci brothers were in some fashion biased against the Government.

The only evidence to support the bias theory was the fact that the Geraci brothers pledged some of their land as collateral for a bond to secure the release of their ranch foreman, Larry Dennison, and Dennison's friends who had been arrested in the cocaine deal in Vero Beach.

Without any foundation in the evidence the prosecutor ultimately argued that the profits to be earned in the cocaine deal were to be used by the Petitioner and the Geraci brothers to pay bribes to get the Geraci rezoning Petition passed by the County Commissioners.

After the Geraci brothers testified for Petitioner Sierra, the Government put on rebuttal testimony concerning the cocaine deal, arrests and potential profits if the cocaine deal had been completed. None of the rebuttal testimony implicated to any extent the Petitioner or any co-defendant. The Geraci brothers were not implicated except for the fact that they pledged part of their land as collateral for the bail bond of those arrested.

The prosecutor speculated in his closing argument to the jury, *without any foundation in the evidence*, that Sierra

had met with the Geraci brothers; that "the government knew what Nick and Peter Geraci were up to" and that the Geraci brothers needed the hidden profits from the cocaine deal to pay the bribe for their rezoning.

During oral argument on appeal to the Eleventh Circuit on May 22, 1985, the Government argued that during the trial the Government had made an *ex parte, in camera,* presentation to the Trial Judge in which the Government presented a foundation for injecting the Vero Beach cocaine deal into this case. The Government's brief on appeal made no such argument or representation and counsel for Petitioner and counsel for co-appellants were surprised by such previously unknown revelations.

The surprise of Petitioner's counsel was expressed in a letter to the Government subsequent to the oral argument on appeal. The letter in reply did not contest the occurrence of these events on oral argument. See Appendix.

Petitioner attempted to correct or modify the record to reflect such *ex parte, in camera* proceeding so that additional briefing and argument could be had on re-hearing. Such attempt was denied and re-hearing was denied by the Court of Appeals.

By pre-trial requests for discovery Petitioner Sierra attempted to obtain disclosure of alleged similar act evidence which the Government contended it had in their possession.

Such requests were unsuccessful except that the Government disclosed one out of six alleged similar acts to Petitioner.

The Government represented that they would use one similar act in their case-in-chief and would attempt to use

the remaining undisclosed acts on rebuttal if Petitioner testified in his own behalf.

During the course of the trial Petitioner attempted on numerous occasions to learn any of the details of the remaining similar acts which the Government desired to use on rebuttal. The Trial Court stated that if the petitioners took the stand and testified that the likelihood of the Court permitting alleged similar fact evidence to be introduced on rebuttal was "very high".

Petitioner filed a Motion for disclosure of other crimes admitted by the prosecution's "star witness" Jerry Bowmer since it would be through Bowmer's acts and testimony that Petitioner's alleged similar acts would be disclosed. The motion was denied and the prosecutor declined to disclose the requested information.

Bowmer testified for the Government during the Government's case-in-chief. Bowmer did not testify concerning any of his admitted similar acts, allegedly committed with Petitioner, which the Government was reserving for rebuttal if Sierra testified. Sierra's desire and attempt to cross-examine Bowmer concerning the details of these alleged similar acts was prohibited.

The Government was never compelled to disclose the information; the Government never disclosed the information; and Petitioner did not testify as a result, although he had no prior criminal record or convictions.

REASONS FOR GRANTING THE WRIT

1. THE COURT'S DENIAL OF ALL PETITIONER'S EFFORTS TO LEARN ANY OF THE FACTS CONCERNING SIMILAR FACT EVIDENCE RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE RIGHT OF THE ACCUSED TO NOTICE AND DISCOVERY OF SUCH SIMILAR FACT EVIDENCE BEFORE PRESENTATION OF HIS DEFENSE

Our system of criminal justice is supposedly based upon competing adversaries who will assist the jury to determine the guilt or innocence of a defendant by a full investigation by trained counsel of the facts. The use of surprise evidence which will unduly prejudice the accused is not favored where liberty is involved. A Defendant should be afforded a fair opportunity to learn the facts within the knowledge and possession of the Government so as to be able to meet it and to adjust his trial strategy if necessary. If the Defendant is not giv n this opportunity then the resulting unfairness may require reversal. *United States v. Kendall*, 766 F.2d 1426 (10th Cir. 1985).

Petitioner Sierra suffered such unfairness in the trial below, despite repeated and varying attempts to learn even the basic facts of approximately five alleged similar acts which the Government's start witness, Jerry Bowmer, was prepared to testify to should Petitioner testify at his trial.

Sierra was unduly prejudiced by this hidden storehouse of relevant facts, solely within the possession and knowledge of the Government, and which would not be disclosed except upon rebuttal to Petitioner's testimony should he testify.

It is disclosure, rather than suppression, that promotes the proper administration of criminal justice. As stated in

Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966):

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."

No exception was justified in this case.

This case reflects important statutory considerations, policy consideration and constitutional considerations growing out of an accused's bona fide efforts to obtain notice of, and to learn, the similar fact evidence which the prosecution intended to use against him during cross-examination of the accused (and for presentation against him on rebuttal) should the accused testify.

Since this Court has not had occasion to address itself to this matter, there are compelling reasons why some definitive guidelines should now be marked by this Court.

From the very commencement of these proceedings until Sierra rested his case, Sierra attempted to obtain some information about the similar facts and acts of which the prosecution said it had knowledge.

The Petitioner was rebuffed at every turn and his requests denied, both pre-trial and trial. Petitioner was even denied the requested opportunity to cross-examine the Government's star witness concerning the similar acts and evidence when the star witness testified for the Government during the Government's case-in-chief.

This Court has long pointed to the duty of the defense attorney to investigate and prepare his client's case. In the

proceedings below the Petitioner's attorney was prevented from performing his duty by the actions of the Government and the Trial Court, and affirmed by the Court of Appeals.

The Government attempted to justify the lack of disclosure because of a fear that the Petitioner would tailor his defense following the disclosure. In *United States v. Projansky*, 44 F.R.D. 550, 556 (S.D.N.Y. 1968), Judge Frankel characterized the Government's refusal to give a defendant his own statements because of a similar fear that the defendant would tailor his defense and testify perjuriously as being "built one-sidedly of interested folklore".

The argument simply cannot justify the unnecessary, unfair, and unproductive restriction imposed upon preparation for and during trial. Even the Petitioner's right to cross-examination of Bowmer was restricted by the unseemly desire to surprise the defendant if he testified.

Once the defendant testified and was faced with the alleged similar acts and evidence by the prosecutor, disclosure would be too late. Quick wits may be the mark of a trial lawyer, but they are not sufficient for the orderly exposition and testing of evidence, which is the purpose of a trial. Where planning is foreclosed by lack of information not even Clarence Darrow would have been adequate to the task. Surprise and gamesmanship would have governed the conduct of the trial. Such is offensive to the dignity of the Court as an institution and destructive of respect for criminal justice.

Where liberty is at stake, gamesmanship is out of place.

Such gamesmanship is apparently a common practice when it relates to disclosure of similar acts and evidence in

the possession of the goverment and unavailable to the defense. Such common practices underscore the desirability of a thorough examination by this Court so that litigants and lower Courts may properly gauge what is proper disclosure under these circumstances.

2. THIS CASE RAISES SIGNIFICANT PROBLEMS CONCERNING THE GOVERNMENT'S CROSS-EXAMINATON OF MATERIAL DEFENSE WITNESSES CONCERNING PREJUDICIAL COLLATERAL MATTERS WHERE NO FOUNDATION WAS PROFFERED OR ESTABLISHED ON THE RECORD. THIS CASE FURTHER RAISES THE UNIQUE PROBLEM OF THE COURT OF APPEALS SO FAR DEPARTING FROM THE ACCEPTED COURSE OF A FEDERAL APPEAL AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

This Court has had rare occasions to discuss the right to due process in criminal appeals in the federal system.

In this case cross-examination of material witnesses (the purported victims of the extortion) was permitted upon a collateral cocaine conspiracy in Vero Beach which did not involve the Petitioner or his co-defendants. Such was permitted without a proper foundation having been established, or proffered by the Government, that the Geraci brothers were involved in the Vero Beach cocaine conspiracy to obtain profits from the sale of cocaine, to bribe the County Commission.

During oral argument before the Eleventh Circuit on May 22, 1985, counsel was surprised by previously unknown revelations by the Government that an *en camera, ex parte* presentation had been made to the Trial Court as a foundation for cross-examination of the Geraci brothers concerning the Vero Beach cocaine conspiracy.

Nowhere in the Government brief on appeal was this presentation to the Trial Court discussed or disclosed as justification for such prejudicial cross-examination.

Such procedures denied Sierra due process in pursuing the appeal he is guaranteed as a matter of right. *Middlebrooks v. United States,* 500 F.2d 1355 (5th Cir. 1974); *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1961).

Such procedures denied Petitioner of a fair opportunity to structure his issues and arguments on appeal to the Eleventh Circuit. If he had known of the contents of the alleged *ex parte, en camera* proffer concerning the Vero Beach cocaine conspiracy there would have been a different structure and emphasis in his brief and modification of the Record on Appeal.

The Eleventh Circuit denied Petitioner's Motion for Rehearing and Motion for Correction and Modification of the Record on Appeal.

In *Evitts v. Lucey*, ____U.S.____, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) this Court found that State Court procedures used in deciding appeals must comport with the demands of due process. This case allows this Court to make clear that an accused is entitled to due process both at trial and on appeal in the federal system as well.

Finally, the correctness of the conviction of Petitioner is open to serious question. The evidence against Petitioner was slight and came from the testimony of Jerry Bowmer, who had much to gain, and who has gained his liberty for the past 2½ years, from his testimony.

CONCLUSION

For the aforementioned reasons, and in the interests of justice, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RAYMOND E. LaPORTE
410 Ware Boulevard
Suite 601
Tampa, Florida 33619
(813) 621-4771

Attorney for Petitioner
MICHAEL SIERRA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3561

D.C. Docket No. 83-00026

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH HENRY KOTVAS, JR.,
FRED ARTHUR ANDERSON,
MICHAEL SIERRA,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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(May 28, 1985)

Before VANCE and HATCHETT, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM:

Judgment Entered: May 28, 1985
For the Court: Spencer D. Mercer, Clerk

By: /s/ [Illegible]
Deputy Clerk

AFFIRMED. See Circuit Rule 25.

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*Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

ISSUED AS MANDATE: AUG 16 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3561

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL SIERRA,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING
( )

BEFORE VANCE and HATCHETT, Circuit Judges and LYNNE*, Senior District Judge.
PER CURIAM:

The Petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
AUG 01 1985
SPENCER D. MERCER
CLERK

Raymond E. LaPorte
Attorney at Law

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HAND DELIVERED

June 7, 1985

Robert W. Merkle, Esquire
United States Attorney
500 Zack Street
Room 410
Tampa, Florida 33602

Re: United States v. Sierra, et al
Case No. 83-3561

Dear Mr. Merkle:

Thank you for your letter of May 30th regarding your intentions concerning the date of surrender. I am sure that the Marshal's office, Bureau of Prisons, and the Courts will act appropriately within their jurisdiction in setting the surrender date.

Your letter does give me the opportunity however, for a dialogue concerning your oral presentation to the Court of Appeals in Mr. Sierra's appeal.

I am sure you recall your argument, as reported, concerning the issue of cocaine charges being interjected into your questioning of the Geracis without a proper foundation being disclosed.

You orally argued that an en camera, ex parte, presentation by you to the Trial Judge disclosed the factual foundation for your questioning. I found no record of such a proceeding in the Record on Appeal. The Government brief did not disclose such a proceeding. The defense counsel who tried the case do not recall such a proceeding. Therefore I would request that you agree to a correction or a supplement to the Record on Appeal so that this proceeding may be included in the Record for purposes of a Petition for Rehearing or a Petition for Certiorari.

EXHIBIT A

Robert W. Merkle, Esq.
United States Attorney
June 7, 1985
Page Two

If such a proceeding was held and not reported or not t. .nscribed, I would request that you advise me of this fact.

In view of the time limitations, I would request that you respond to this letter by June 14th. If I do not hear from you I will assume that you agree that such a hearing occurred and was reported and that you have no objection to such a correction or supplement of the Record.

Thank you for your consideration of this matter.

Sincerely yours,

/s/ Raymond E. LaPorte
RAYMOND E. LaPORTE

REL/b
cc: Mr. Michael Sierra
Bennie Lazzara, Esq.
Richard Lazzara, Esq.
James V. Caltagirone, Esq.

U.S. Department of Justice
United States Attorney
Middle District of Florida

TAZ/mh

HAND DELIVER

410 Robert L. Timberlake Building
500 Zack Street
Tampa, Florida 33602

813/228-2941
FTS/826-2941

June 14, 1985

Raymond E. LaPorte, Esq.
410 Ware Boulevard
Suite 601
Tampa, Florida 33619

Re: United States v. Sierra, et al
Case No. 83-3561

Dear Mr. LaPorte:

We are in receipt of your letter dated June 7, 1985, concerning the oral argument in the above-captioned case.

It is our recollection that an *in camera ex parte* presentation by the government of the factual basis for cross examination of the Geracis regarding the involvement in cocaine did occur. The contents of that factual basis was or should have been made a part of the record on appeal. Since you have made inquiries, we intend to verify that the presentation of the factual basis was documented.

We certainly have no objection to correcting or supplementing the record on appeal, if necessary, so that the record accurately reflects what took place in the trial court.

Very truly yours,

ROBERT W. MERKLE
United States Attorney

By: /s/ Terry A. Zitek
TERRY A. ZITEK
Chief, Criminal Division

cc: Richard Lazzara, Esq.
James V. Caltagirone, Esq.

EXHIBIT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3561

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH HENRY KOTVAS, JR.,
FRED ARTHUR ANDERSON,
MICHAEL SIERRA,
Defendants-Appellants,

Appeal from the United States District Court for the
Middle District of Florida

O R D E R:

Appellants motion for correction or modification of the record is denied.

/s/ JOSEPH W. HATCHETT
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
AUG 01 1985
SPENCER D. MERCER
CLERK

MOT-6H
(Rev. 5/82)